November 15, 2013

TO: Grant Boyken
Executive Director
California Secure Choice Retirement Savings Investment Board
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FROM: California Chamber of Commerce
California Manufacturers and Technology Association

RE: Response to California Secure Choice Retirement Savings Investment Board's Request for Information

During the legislative progress of Senate Bill 1234 (Chapter 734, 2012), the authorizing statute enacting the California Secure Choice Retirement Savings Program (Program), the employer community expressed significant concerns with the proposed plan. Although we ultimately removed our opposition, we did so to allow a feasibility study to be conducted that fully explores our concerns regarding the implementation and operation of the Program and for the Legislature to reapprove the Program based on the findings that certain conditions apply, as outlined in the legislation. In response to the Request for Information issued by the California Secure Choice Retirement Savings Investment Board (Board), the California Chamber of Commerce (CalChamber) and the California Manufacturers and Technology Association (CMTA) reiterate our concerns and offer the following employer perspective.

Administrative Issues

As employers, our primary concern is that this Program is subject to ERISA, the Employee Retirement Income Security Act of 1974. If it is, employers will be exposed to significant administrative costs, liabilities and fiduciary responsibilities required by the laws and regulations that apply to ERISA plans.

Although this Program would be established and maintained by the State, its beneficiaries would be private-sector employees. According to the Internal Revenue Code Section 414(d), only government plans that are established and maintained for government employees are exempt from ERISA. For these and other reasons, we continue to believe that ERISA's requirements will apply to this Program and that the Program will not be the no-cost, no-risk alternative to providing retirement benefits to our employees, as presented to the Legislature.

According to the new statute, the Program cannot be implemented if the plan is determined to be an employee benefit plan under ERISA (Government Code Section 100043). Because so much is at stake for employers regarding the ERISA determination, we urge the Board to obtain an ~~advisory~~ opinion from the United States Department of Labor at the earliest possible point in the study specifying that the Program, and all employers with employees in the Program, is fully exempt from the requirements of ERISA. This solicitation should be included as a required element in the RFP.

Secondly, the Program must qualify for the favorable federal income tax treatment received by individual retirement accounts (IRAs) in order to be implemented. We urge the Board to obtain a private letter ruling from the Internal Revenue Service (IRS) that states the IRA arrangements proposed by the Program qualify for the tax-deferred treatment afforded such plans. This solicitation should also be part of the RFP required scope of work.

Developing the RFP

The design and development of the RFP and of the Program must engage employers in the process from the beginning, during the development of the RFP. When drafting the RFP, we urge the Board to include in its scope of work a requirement for the vendor to also convene an advisory group of employers of various sizes and industry sectors to review and comment on the plan. Any potential Program design must be feasible to administer and not unduly burden employers.

Additionally, the RFP should require a thorough examination and analysis of how ERISA requirements would apply to the Program. The vendor must be required to obtain opinions from DOL and the IRS regarding the assignment of fiduciary responsibility and tax liability respectively, as mentioned above.

The vendor must also conduct a thorough review of all state and federal banking, investment and tax rules to determine any impact on the Program.

The RFP must include a requirement for the vendor to provide scenarios of a typical investment in the Program compared to a typical investment in a traditional IRA from a commercial provider. These scenarios must include various investor profiles, such as an employee with multiple jobs, a mobile employee moving from job to job, and at various ages.

We would urge the Board to reconsider the proposed timeline, which only allows a month and a half for the review of RFI responses and the development of the RFP. The RFP must be thoughtfully prepared to include all relevant requirements for plan design and analysis in order to ensure employers and employees are not inadvertently put at risk.

Plan Structure

Assuming the Board obtains an opinion from DOL regarding the Program's exemption from ERISA rules, the Program must still be structured in a way so not to impose additional costs and liabilities on employers beyond what is required in the legislation. There must be no financial risk or liability to the employer and no fiduciary responsibility.

Employees enrolled in the program must have access to a point of contact that can explain the Program, answer questions and take complaints and that does not involve the employer. The employee must fully understand that this is not the employers' responsibility and that their investment decisions are their own.

The Program must clarify how it adapts to employees with multiple employers.

The employee information packet developed by the Board must be clear and concise regarding employee's exclusive responsibility for their investment decisions and that these responsibilities are not those of the employer. The specific language contained in Government Code section 100034 regarding employer's immunity under this Plan must be included in the employee information packet. This is especially necessary to avoid litigation against employers due to employee misunderstandings.

To further discuss our comments, please contact Nicole Rice (CMTA) at (916) 498-3322 or Marti Fisher (California Chamber of Commerce) at (916) 444-6670.